APPENDIX

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APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-14612
Non-Argument Calendar

Agency No. A098-946-377

[Filed May 3, 2010]

YOUN MUN HEE,

Petitioner,

versus

U.S. ATTORNEY GENERAL,

Respondent.

Petition for Review of a Decision of the Board of Immigration Appeals

(May 3, 2010)

Before BLACK, HULL and PRYOR, Circuit Judges.

PER CURIAM:

Youn Mun Hee, a citizen of South Korea, petitions for review of the Board of Immigration Appeals's ("BIA") dismissal of his appeal of the Immigration Judge's ("IJ") order denying his motion to reopen removal proceedings. After review, we deny the petition for review.

I. BACKGROUND FACTS

In June 2006, Hee was discovered in the United States after he was arrested by police in DeKalb County, Georgia. On June 27, 2006, an immigration official interviewed Hee and prepared a Form I-213 "Record of Deportable/Inadmissible Alien." Hee admitted that he had entered the United States illegally by walking across the U.S. border with Canada, stated that he was amenable to removal and requested a hearing before an Immigration Judge. During the interview, Hee reported his address as 908 Glenridge Lane in Nashville, Tennessee.

On the same day, Hee was served with a Notice to Appear ("NTA") indicating that his hearing would be in Atlanta, Georgia at a date and time to be set. The NTA also listed Hee's address as 908 Glenridge Lane in Nashville and indicated that his notice of the hearing would be sent to the address Hee had provided. The NTA warned Hee, inter alia, that: (1) he was "required to provide the [Immigration and Naturalization Service ("INS")], in writing, with [his]

full mailing address and telephone number"; (2) if his address or telephone number changed during the course of immigration proceedings, Hee must "notify the Immigration Court immediately by using Form EOIR-33"; (3) if Hee failed to submit Form EOIR-33 and did not "otherwise provide an address" at which he could be reached, the government was not required to provide him with written notice of his hearing; and (4) if Hee failed to appear at his hearing, the Immigration Judge might enter a removal order in his absence.

On July 15, 2008, Hee's wife, a naturalized United States citizen, submitted a Form I-130 "Petition for Alien Relative," to the Department of Homeland Security ("DHS") so that Hee could apply for an adjustment of status to that of a lawful permanent resident. Hee's wife was represented by counsel in connection with the Form I-130 petition. On the form, Hee's wife indicated that Hee's address was 6734 Mimosa Circle in Tucker, Georgia and that he had lived at that address since October 2007. Hee's wife also indicated on the form that Hee was in removal proceedings in Atlanta in May 2008. Nowhere on the form did Hee's wife indicate that Hee's Tucker, Georgia address was a change of address.

On July 23, 2008, the Immigration Court mailed a Notice of Hearing ("NOH") to Hee's Nashville, Tennessee address, stating that Hee's hearing would be held on September 17, 2008. The NOH was returned as "not deliverable." The return envelope indicated that it could not be forwarded. When Hee failed to appear at his hearing, the IJ ordered Hee removed in absentia.

In December 2008, Hee moved the IJ to reopen his removal proceedings and rescind the in absentia removal order. Hee argued that he did not receive proper notice of the hearing because the NOH was not sent to his Tucker, Georgia address listed on the Form I-130. The IJ denied the motion, finding that the NOH was sent to the address Hee provided to immigration officials when he was apprehended, as indicated on the NTA. The IJ concluded that Hee had failed to notify the Immigration Court of his address change and, thus, was not entitled to have his removal order rescinded.

Hee appealed to the BIA, arguing that he notified the Attorney General of his address change via the Form I-130 and that notice of a new address need not be on a Form EOIR-33 to be valid. The BIA dismissed Hee's appeal. The BIA concluded that Hee had "failed to notify the Court of his change of address by filing a Form EOIR-33" and agreed with the IJ that notice of the hearing "was adequate because the NOH was sent to the last address of record." Hee filed this petition for review.

II. DISCUSSION

An alien who seeks to reopen removal proceedings following the entry of an in absentia removal order must demonstrate either exceptional circumstances or that the alien did not receive proper notice under 8 U.S.C. § 1229(a)(1) or (2). INA § 240(b)(5)(C), 8 U.S.C. § 1229a(b)(5)(C).[1] Hee does not contend that he has

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[1] We review the denial of a motion to reopen for abuse of discretion. See Anin v. Reno, 188 F.3d 1273, 1276 (11th Cir. 1999).

shown exceptional circumstances, but argues that his notice of the hearing was not proper under § 1229(a)(2).[2]

Under § 1229(a)(1), an alien in removal proceedings must be provided with written notice of the time or place of the alien's hearing. INA § 239(a)(1)(G)(I), 8 U.S.C. § 1229(a)(1)(G)(I). Pursuant to § 1229(c), this notice is effective if sent by mail "to the last address provided by the alien in accordance with subsection (a)(1)(F)." Id. § 239(c), 8 U.S.C. § 1229(c).

If such written notice is provided, but the alien nonetheless fails to attend the hearing, that alien shall be removed in absentia if the government proves that notice was sent and that the alien is removable. INA § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A). Due process is satisfied "so long as the method of notice is conducted in a manner reasonably calculated to ensure

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"In this particular area, the BIA's discretion is quite broad." Id. (internal quotation marks omitted). Our review is limited to whether the exercise of discretion was "arbitrary or capricious." Abdi v. U.S. Att'y Gen., 430 F.3d 1148, 1149 (11th Cir. 2005). The BIA's legal determinations are reviewed de novo. Castillo-Arias v. U.S. Att'y Gen., 446 F.3d 1190, 1195 (11th Cir. 2006). Where, as here, the BIA did not expressly adopt the IJ's decision or reasoning, we review only the BIA's decision. See Al Najjar v. Ashcroft, 257 F.3d 1262, 1284 (11th Cir. 2001).

[2] In the context of a motion to reopen an in absentia removal order, our jurisdiction to review is limited to: (1) the validity of the notice provided to the alien; (2) the reasons why the alien did not attend the proceeding; and (3) whether the alien is removable. INA § 240(b)(5)(D), 8 U.S.C. § 1229a(b)(5)(D). Thus, we have jurisdiction to review Hee's claim that he failed to appear because he did not receive valid notice of the hearing.

that notice reaches the alien." U.S. Att'y Gen. v. Dominguez, 284 F.3d 1258, 1259 (11th Cir. 2002) (quotations marks omitted) (concluding that a handwritten note that an alien was "staying with" her cousin at a particular address did not satisfy the requirement to provide the Attorney General with written notice of a change of address). Thus, when the alien has failed to appear, "written notice by the Attorney General shall be considered sufficient . . . if provided at the most recent address provided under section 1229(a)(1)(F)." INA § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A); see Dominguez, 284 F.3d at 1260-61.

Section 1229(a)(1)(F)(ii) imposes upon the alien an affirmative duty to "provide the Attorney General immediately with a written record" of his change of address. INA § 239(a)(1)(F)(ii), 8 U.S.C. § 1229(a)(1)(F)(ii); Dominguez, 284 F.3d at 1260-61. The regulation implementing this statutory provision requires the alien to provide "written notice of the change of address on Form EOIR-33 to the Immigration Court where the charging document has been filed." 8 C.F.R. § 1003.15(d)(2).

On appeal, Hee argues he satisfied his duty to inform the Attorney General of his change of address when his wife submitted the Form I-130 "Petition for Alien Relative," to DHS and, therefore, his NOH should have been sent to his Tucker, Georgia address. We disagree.

Although the Form I-130 Hee's wife submitted to DHS gave Hee's Tucker, Georgia address, the form did not give any indication at all that the Tucker, Georgia address was a new address or that Hee's address had changed since his removal proceedings began and he

provided the Nashville, Tennessee address. Indeed, because the Form I-130 indicates that Hee has lived at the Tucker, Georgia address since October 2007 and incorrectly states that Hee's removal proceedings began in May 2008 (when in fact they began in June 2006), from the face of the form it appears Hee's address has not changed since removal proceedings began. For these reasons, even assuming arguendo a Form I-130 could be used to make the required change-of-address notification, the contents of the particular Form I-130 Hee's wife submitted were insufficient to constitute a written record of an address change within the meaning of § 1229(a)(1)(F)(ii).[3]

Given that the Immigration Court mailed the NOH to Hee's address in Nashville, Tennessee, the last address Hee provided, the government's notice was sufficient under 8 U.S.C. § 1229a(b)(5)(A) and § 1229(c). Accordingly, there is no basis to conclude that the BIA abused its discretion in denying Hee's motion to reopen.

PETITION DENIED.

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[3] Because we conclude that the contents of the particular Form I-130 Hee's wife submitted were insufficient to notify the Attorney General of Hee's address change, we need not address Hee's argument that the BIA erred in requiring his change-of-address notification to be on Form EOIR-33 and that 8 C.F.R. § 1003.15(d)'s requirement that aliens use Form EOIR-33 goes beyond § 1229(a)(1)(F)(ii) and is an unreasonable interpretation of that statute. We likewise do not address the government's argument that submitting the Form I-130 was insufficient to notify the Attorney General because it was sent to DHS, which is not a component of the Department of Justice or a delegate of the Attorney General.

APPENDIX B

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Wong, Margaret W., Esq.
Margaret Wong & Associates
3150 Chester Avenue
Cleveland, OH 44114-0000

Office of the Chief Counsel - USICE/DHS - ATL
180 Spring Street, Suite 332
Atlanta, GA 30303

Name: HEE, YOUN MUN A098-946-377

Date of this notice: 8/24/2009

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr

Donna Carr
Chief Clerk

Enclosure

Panel Members:
King, Jean C.

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A098 946 377 - Atlanta, GA

Date: AUG 24 2009

In re: YOUN MUN HEE

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:
Margaret Wong, Esquire

ON BEHALF OF DHS:
Kelley N. Sydnor
Assistant Chief Counsel

APPLICATION: Reopening

The respondent, a native and citizen of South Korea, has appealed the Immigration Judge's December 18, 2008, denial of his motion to reopen proceedings in which he was ordered removed *in absentia*. The appeal will be dismissed.

The respondent was ordered removed in absentia on September 17, 2008. He filed a motion to reopen arguing that he did not receive the July 23, 2008,

Notice of Hearing (NOH). The Immigration Judge found, however, that the notice was mailed to the respondent's last known address. On appeal, the respondent argues that he provided a correct address to the Department of Homeland Security ("DHS") which is sufficient notice of change of address, and the court did not mail the NOH to the correct address. According to the respondent, he had, before the NOH was issued, filed through counsel an I-130 application with the DHS containing a different, correct address. However, the record reflects that the respondent was personally served with the Notice to Appear and provided oral and written notice of the address requirements and of the consequences of failing to appear for his hearing. The respondent failed to notify the Court of his change of address by filing a Form EOIR-33. Consequently, we agree with the Immigration Judge that notice was adequate because the NOH was sent to the last address of record. *See Dominguez v. United States Attorney General*, 284 F.3d 1258 (11th Cir. 2002)

ORDER: The appeal is dismissed.

/s/ Jean King
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
IMMIGRATION COURT
180 SPRING ST., SW, SUITE 241
ATLANTA, GA 30303

MARGARET WONG & ASSOCIATES
WONG, ESQ., MARGARET W.
3150 CHESTER AVE
CLEVELAND, OH 44114

IN THE MATTER OF
HEE, YOUN MUN

FILE A 098-946-377 DATE: Dec: 19, 2008

__ UNABLE TO FORWARD - NO ADDRESS PROVIDED

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE. THIS DECISION IS FINAL UNLESS AN APPEAL IS FILED WITH THE BOARD OF IMMIGRATION APPEALS WITHIN 30 CALENDAR DAYS OF THE DATE OF THE MAILING OF THIS WRITTEN DECISION. SEE THE ENCLOSED FORMS AND INSTRUCTIONS FOR PROPERLY PREPARING YOUR APPEAL. YOUR NOTICE OF APPEAL, ATTACHED DOCUMENTS, AND FEE OR FEE WAIVER REQUEST MUST BE MAILED TO:

BOARD OF IMMIGRATION APPEALS
OFFICE OF THE CLERK
P.O. BOX 8530
FALLS CHURCH, VA 22041

__ ATTACHED IS A COPY OF THE DECISION OF THE IMMIGRATION JUDGE AS THE RESULT OF YOUR FAILURE TO APPEAR AT YOUR SCHEDULED DEPORTATION OR REMOVAL HEARING. THIS DECISION IS FINAL UNLESS A MOTION TO REOPEN IS FILED IN ACCORDANCE WITH SECTION 242B(c) (3) OF THE IMMIGRATION AND NATIONALITY ACT, 8 U.S.C. SECTION 1252B(c) (3) IN DEPORTATION PROCEEDINGS OR SECTION 240(c) (6), 8 U.S.C. SECTION 1229a(c) (6) IN REMOVAL PROCEEDINGS. IF YOU FILE A MOTION TO REOPEN, YOU MOTION MUST BE FILED WITH THIS COURT:

IMMIGRATION COURT
180 SPRING ST., SW, SUITE 241
ATLANTA, GA 30303

__ OTHER: See attached

/s/
COURT CLERK
IMMIGRATION COURT FF

CC: DHS

U.S. DEPARTMENT OF JUSTICE
Executive Office for Immigration Review
Office of the Immigration Judge

In the Matter of:
Youn Mee Hee
RESPONDENT/APPLICANT

Case No.: A 098 946 377
Docket: Atlanta
IN Removal PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of respondent's/applicant's

- ☐ Motion to Reconsider an Immigration Judge's decision
- ☒ Motion to Reopen proceedings

filed in the above entitled matter, it is **HEREBY ORDERED** that the motion

- ☐ be granted.
- ☒ be denied for the reasons indicated in the attached decision.

/s/ Grace A. Sease
Immigration Judge

Date: Dec. 18, 2008

Appeal: RESERVED/WAIVED (A / I / B)

Form EOIR - 2
REV. - JUNE 93

Youn Mee HEE
A 098 946 377

The respondent though counsel has filed a motion to reopen an *in absentia* proceeding. The government does not support the motion. The motion will be denied.

The respondent was placed in proceedings on or about June 30, 2006 with the issuance and personal service of a Notice to Appear. *Exhibit 1.* The respondent was advised of his rights in the Korean language, *Exhibit 2.* At the time the respondent was apprehended and processed by ICE, he advised the special agent conducting the interview that he entered the United States by walking across the Canadian border near Seattle, Washington and that he was not inspected or admitted. Accordingly he was charged with being subject to removal pursuant to the provisions of Section 212(a)(2)(6)(I).

The Notice to Appear was filed with the Immigration Court and notice of hearing was sent to the respondent at the address he provided when apprehended. At the time he was served with the Notice to Appear, the respondent was advised of the requirement that he notify the court of any change of address.

An order entered *in absentia* in removal proceedings may be rescinded only (I) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that his failure to appear was because of exceptional circumstances or (ii) upon a motion to reopen filed at any time if he demonstrates that he did not receive due notice or that he was in federal or state custody and his failure to appear was

through no fault of his own. 8 C.F.R.§ 1003.23(b)(4)(ii). The failure to appear because of "exceptional circumstances" refers to circumstances such as serious illness or death of an immediate relative, but not including less compelling circumstances. INA § 240(e)(1).

In *Dominguez v. U.S. Attorney General*, 284 F.3d 1258, 1259 (11th Cir. 2002), the Eleventh Circuit Court of Appeals held that due process is satisfied "so long as the method of notice is conducted in a "in a manner 'reasonably calculated' to ensure that notice reaches the alien." Citations omitted.

Moreover, in light of the respondent's admission when apprehended that he came into the United States by walking across the U.S.-Canada border and that he was not inspected or admitted, he is ineligible to adjust his status in the United States.

The respondent failed to notify the Court of his change of address. Accordingly, the notice of hearing was sent to his last known address, a manner reasonably calculated to ensure that notice reached him.

Accordingly, the motion to reopen is denied.

Done and ordered this 18th day of December 2008

/s/ Grace A. Sease
Grace A. Sease
U.S. Immigration Judge

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 09-14612-GG

[Filed August 11, 2010]

YOUN MUN HEE,	)
	)
Petitioner,	)
	)
versus	)
	)
U.S. ATTORNEY GENERAL,	)
	)
Respondent.	)
	)

Petition for Review of a Decision of the Board of Immigration Appeals

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

Before: BLACK, HULL and PRYOR, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Frank M. Hall
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)